2006

Brent Poll v. Board of Adjustment for the City of South Weber : Brief of Appellee

Utah Court of Appeals

Brent Poll; Pro Se Appellant.
Christopher F. Allred; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

BRENT POLL,	:	
Petitioner/Appellant	:	Case No. 20061012-CA
vs.	:	
BOARD OF ADJUSTMENT for the City of South Weber,	:	
Respondent/Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM GRANT OF APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, THE HONORABLE JON M. MEMMOTT

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over this matter pursuant to Utah Code §78-2a-3(2)(b)(i) and/or (j).

ISSUES ON APPEAL AND STANDARD OF REVIEW

I. Whether jurisdiction may be raised for the first time at the district court.

II. Whether the board of adjustment's authority to hear and decide appeals is limited to appeals emanating from an affirmative order, requirement, decision or determination in which a land use authority has applied a land use ordinance to a particular application, person, or parcel.

III. Whether the Board of Adjustment has authority to compel the City to enforce its ordinances when a city resident alleges a failure on the part of the city to do so.

IV. Whether the individual issues raised by Mr. Poll are appeals emanating from an affirmative order, requirement, decision or determination in which a land use authority has applied a land use ordinance to a particular application, person, or parcel.

The first three issues present questions of law which are reviewed for correctness, giving no deference to the decision of the district court. See e.g., Foutz v. City of South Jordan, 100 P.3d 1171 (Utah 2004). The fourth issue appears to be primarily a question of fact. Findings of fact are reviewed under a "clearly erroneous" standard of review. Under this standard of review, the appellant is required to marshal the evidence which supports the finding and then demonstrate that, despite this evidence, the finding is clearly erroneous. Christensen v. Munns, 812 P.2d 69, 73 (Utah Ct. App. 1991).

ISSUES PRESERVED IN TRIAL COURT

The trial courts findings of fact and conclusions of law (Record at 405 - 410) and the transcript of the oral argument on the Board's motion to dismiss (Record at 428) demonstrate that the issues recited above were preserved at trial.

STATEMENT OF THE CASE

This case is the result of several issues raised by the appellant, Mr. Poll, to the South Weber City Board of Adjustment. The board of adjustment provided responses unfavorable to Mr. Poll, and he appealed those decisions to the district court. The district court held that the board of adjustment did not have jurisdiction to resolve Mr. Poll's issues in the first place and, therefore, the district court was without jurisdiction to review the Board's determinations. The case was dismissed on the Board's motion to dismiss for lack of jurisdiction.

STATEMENT OF RELEVANT FACTS

1. On two separate occasions Mr. Poll submitted lists of complaints and issues concerning South Weber City to the Board of Adjustment for South Weber City (hereinafter the Board). Poll characterized the lists as "appeals" to the Board (Record at 406).

2. The first set of issues submitted by Poll are as follows:

   A. Subdivision plat issues. Poll states in his petition that he "challenged the Mayor's failure to require the subdivider to either stay within the drawn-to-scale boundaries of the approved plat . . . or to require the subdivider to vacate the approved plat and create a new one. . ." (Record at 4 and 406).

   B. Vinyl Fence. This issue involves an appeal of a decision made by the city council not to require a chain link fence under Section 11-4-13 of the City's subdivision

ordinance (Record at 7-9, 169 and 406).

C. Construction of the road. This appears to be a dispute about whether a road was created during the construction of a subdivision in the City (Record at 9-11, 170 and 406).

D. Easements on 1375 East. Mr. Poll apparently alleges that the mayor, city manager, and city attorney improperly offered opinions concerning the necessity of obtaining easements on 1375 East (Record at 11-15 and 406).

3 The second set of issues submitted by Poll are as follows:

A. Sewer placement trespass issue. "Failure to apply/enforce 10-3-2 in basic trespass issue relating to recent sewer placement onto Lester from the Byram Subdivision. Described in greater detail in 2 Apr 2005 letter to the Board." (Record at 24-25 and 406-407).

B. Fire hydrant issue. "[f]ailure to apply/enforce ordinance 10-3-2, 10-3-9, and 10-14-10 described in greater detail in 31 Mar 2005 letter to the Board. Matter involves placement of a fire hydrant at the end of 1375 East without the requisite support facilities." (Record at 26-27 and 407).

C. Interpretation and application of the city's sensitive land ordinance. "Interpretation of Sensitive Land Ordinance (Title 10, Chapter 14), violation of it by the developer of the Highland Estates Subdivision (slope destruction), and the unresolved dispute concerning it between the City and the Davis and Weber Counties Canal Company. Particular emphasis on the Company's insistence that destruction has occurred and that an independent third-party-expert opinion is still required to address this

violation. This is cited in limited form in the 31 Mar 05 letter to the Board (item 1 B)." (Record at 28-29 and 407).

4. The issues raised by Poll primarily involve alleged wrongful failures on the part of the City to apply or enforce various ordinances. In several instances, by way of remedy, Poll requests that the Board force the City to enforce the ordinances that Poll alleges were not being enforced.

5. The first list of issues was submitted prior to May 2, 2005, the date on which a number of amendments to the Municipal Land Use, Development, and Management Act (hereinafter the Act) became effective. The second list was submitted after May 2, 2005.

6. The Board heard and decided the issues in open and public meetings and found that the City had not wrongfully failed to enforce or apply its ordinances, except as pertaining to the requirement that a developer install a vinyl fence rather than a chain link fence.

7. Mr. Poll was dissatisfied with the decisions of the Board and appealed them to the district court. Poll filed two separate appeals: one was assigned to Judge Memmott, case #050700359, and the other to Judge Page, case #050700250. Based on Poll's motion, these cases were consolidated under case #050700359.

8. The Board, having subsequently determined that it lacked the authority to resolve the issues raised by Poll, moved the district court to dismiss Poll's appeals for lack of jurisdiction.

9. The district court, Judge Jon M. Memmott, held that each of the items raised by Mr. Poll were outside of the limited jurisdiction of the Board. Therefore, the court dismissed Mr. Poll's petitions for review based on the Board's lack of jurisdiction (Record at 410).

SUMMARY OF ARGUMENTS

The point of the arguments made in this brief is not to deprive Mr. Poll of any lawful remedies that may be available. However, the board of adjustment is simply not the correct venue to resolve his complaints. The Board does not have jurisdiction to resolve the issues raised or to provide the remedies requested.

Issue I. The issue of subject matter jurisdiction may be raised at any time, including for the first time at the district court, because such issues determine whether a court has authority to address the merits of a particular case. When reviewing a board of adjustment decision, it would not make sense for a district court to review the merits of a case over which the Board did not have jurisdiction to begin with.

Issue II. Mr. Poll has submitted a number of issues to the Board. The complaints or grievances submitted involve alleged failures on the part of the city to enforce its ordinances. Pursuant to Utah Code Ann. §10-9a-707(4), "Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority." None of the issues raised involves a "decision" in which a land use authority has applied a land use ordinance to a particular application, person, or parcel. Therefore, the Board (and consequently the district court) had no jurisdiction over the subject matter of the issues Poll raised.

Issue III. Alleging that the mayor and other city officials and agencies have failed to comply with or enforce city ordinances, Poll seeks to have the Board compel them to enforce the ordinances he feels are going unenforced. Assuming Mr. Poll had grounds, the proper remedy for these types of claims would be injunction, mandamus, abatement, or other appropriate

remedies. The Board, however, has no authority to resolve these types of issues or to provide the requested relief, and the Board should not be used as a means to circumvent the formal requirements associated with pursuing the remedies already provided.

Issue IV. An analysis of each of the individual issues raised by Mr. Poll shows that none of them are issues over which the Board has jurisdiction.

ARGUMENT

I. JURISDICTION MAY BE RAISED FOR THE FIRST TIME AT THE DISTRICT COURT

The district court correctly determined that jurisdiction may be raised at any time (Record at 408). The court determined that even though the Board may have initially failed to recognize that it lacked the authority to resolve the issues raised by Mr. Poll when those issues were presented to the Board, the Board may nevertheless argue that the Board, and consequently the district court, did not have subject matter jurisdiction over the issues Poll raised. The court relied on Ameritemps, Inc. v. Labor Com'n, 128 P.3d 32 (Utah Ct. App. 2005) in reaching this conclusion. In Ameritemps, the Utah Court of Appeals elaborated on the fact that subject matter jurisdiction can be raised at any time:

> "'Questions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case.'" Housing Auth. v. Snyder, 2002 UT 28, ¶11, 44 P.3d 724. In addition, because subject matter jurisdiction is a prerequisite to this court's power to consider the substantive issues, the requirement that the court have proper jurisdiction over the subject of the dispute cannot be waived. See, e.g., Chen v. Stewart, 2004 UT 82, ¶34, 100 P.3d 1177; Barnard v. Wassermann, 855 P.2d 243, 248 (Utah 1993). Issues relating to subject matter jurisdiction are threshold questions that should be addressed before resolving other claims. See Snyder, 2002 UT 28 at ¶11, 44 P.3d 724. Because we conclude

> that Petitioners' challenge to subject matter jurisdiction is properly before us, we consider it before addressing their challenge to the Board's substantive decision."

Ameritemps, Inc. v. Labor Com'n, at 35-36.

Mr. Poll appears to be arguing either that the Board has discretion to determine for itself the matters over which it will assume jurisdiction (see e.g. Record at 428, transcript of oral argument p. 32, lines 18 and 19), or that because the Board thought it had jurisdiction when it originally responded to his complaints, the Board has waived any right to argue that it now recognizes that it did not have jurisdiction over the subject of the dispute (Brief of Appellant at 13-14). However, according to Mr. Poll's logic, the Board could resolve all kinds of issues for which it had no authority so long as it originally believed it did have authority. For example, if the Board was requested to resolve a search and seizure issue, or to pass upon the guilt or innocence of a person charged with a crime, so long as the Board "thought" it had jurisdiction to resolve those issues at the time, the issue of jurisdiction could not be challenged later. This of course would be incorrect. The district court correctly pointed out that just because the Board may have thought they had jurisdiction does not mean that they actually had jurisdiction (Record at 35-36). Moreover, as explained in Ameritemps, Inc., the requirement for proper jurisdiction over the subject of the dispute cannot be waived.

II. THE BOARD OF ADJUSTMENT'S AUTHORITY TO HEAR AND DECIDE APPEALS IS LIMITED TO APPEALS EMANATING FROM AN AFFIRMATIVE ORDER, REQUIREMENT, DECISION OR DETERMINATION IN WHICH A LAND USE AUTHORITY HAS APPLIED A LAND USE ORDINANCE TO A PARTICULAR APPLICATION, PERSON, OR PARCEL

A. **The nature of Mr. Poll's complaints/grievances**. In this case, Mr. Poll brought

numerous complaints and grievances, characterized as "appeals", before the South Weber City Board of Adjustment. The issues raised by Poll primarily involve allegations that the City failed to take various courses of action that Poll feels were required under city ordinances. In Mr. Poll's letter to the Board of Adjustment dated 24 Feb 2005, he specifically states: "This is an appeal of failures to enforce several zoning provisions within our City ordinances. Our commissioners and council members have been made well aware of them through various forums (including a training session provided by the league of cities and towns), but have not exercised the power and authority inherent to their offices to affect compliance. Our Mayor . . . has primary responsibility in our City for enforcing our ordinances but has failed to do so. . ." (Record at 168). The district court found that none of the issues raised by Poll were properly before the Board because the Board did not have jurisdiction to resolve them.

B. **Subject matter jurisdiction of the board of adjustment**. Appeal authorities such as the board of adjustment have no inherent authority; they have only the very limited authority granted by state statute or local ordinance. Utah Code Ann. §10-9a-707(4) states "**Only** those **decisions** in which a **land use authority** has **applied a land use ordinance** to **a particular application, person, or parcel** may be appealed to an appeal authority." (Emphasis added) Utah Code Sections 10-9a-701(1)(b), 10-9a-701(2), and 10-9a-703 each reinforce the need for an official "decision" made by a "land use authority" applying a "land use ordinance" to a specific "application, person, or parcel."[1]

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[1] The following definitions found at U.C.A. §10-9a-103 are helpful:
(2) "Appeal authority" means the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.

(13) "Land use application" means an application required by a municipality's land use

This is entirely consistent with the way the Utah Court of Appeals has interpreted former U.C.A. §10-9-704, which addressed appeals to the board of adjustment by persons adversely affected by a decision administering or interpreting a zoning ordinance.[2] In Busche v. Salt Lake County, 26 P.3d 862, 867 (Utah Ct. App. 2001), the Utah Court of Appeals identified four specific elements necessary for a proper claim under U.C.A. §17-27-704 (this section applied specifically to county boards of adjustment, but the language is identical to §10-9-704). The elements of a proper appeal include: "(1) a person adversely affected, (2) a decision administering or interpreting a zoning ordinance, (3) a decision applying the zoning ordinance, and (4) an error in the decision administering or interpreting the zoning ordinance."

The authority granted to the Board under South Weber City Ordinance 10-4-4 also limits its review to appeals from a specific order, requirement, decision or determination made an administrative official in the enforcement of the planning or zoning provisions of the City ordinances.

Typical situations where a land use authority applies a land use ordinance to a particular application, person, or parcel include applications for conditional use permits, zoning changes, building permits, certificates of occupancy and so forth. In each of these instances a land use

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ordinance.

(14) "Land use authority" means a person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application.

[2] Former Section 10-9-704(1)(a)(i): "The applicant or any other person or entity adversely affected by a decision administering or interpreting a zoning ordinance may appeal that decision applying the zoning ordinance by alleging that there is error in any order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance."

authority is required to make a formal decision based on the required land use application. Only after such a decision is rendered, and a person is adversely affected by that decision, is there an issue that is ripe and appropriate for appeal to the board of adjustment.

C. The distinction between affirmative "decisions" and alleged failures to act. A review of the issues/grievances raised by Mr. Poll demonstrates that they are not *decisions* in which a *land use authority* has *applied a land use ordinance* to *a particular application, person, or parcel.* Nor are they appeals from a specific order, requirement, decision or determination made by the administrative official in the enforcement of a planning or zoning provision.

Primarily Poll complains about alleged violations of ordinances and/or failures to act rather than responding to an affirmative "order, requirement, decision or determination." As previously discussed, there must be some official action from which to appeal. Standing alone, violations or failures to act cannot correctly be considered "orders, requirements, decisions or determinations" from which an appeal may be taken. In Toone v. Weber County, 57 P.3d 1079, 1082 (Utah 2002), the Utah Supreme Court distinguished between formal "decisions" and alleged violations or failures to act under the County Land Use Development and Management Act: "Standing alone, violations of CLUDMA cannot correctly be considered 'decisions' by the county, unless the county, through official action, decided to disregard the Act. . ." The court also held the following: "Nor, as noted above, can the alleged failure to comply with the procedural requirements of CLUDMA be considered a land use decision." Alleged failures to comply with procedural requirements are at the heart of Mr. Poll's complaints.

Whether an allegation arises in response to a formal land use decision as opposed to a claim alleging a failure to act is critical in determining what remedies may be available. For

instance, in Foutz v. City of South Jordan, 100 P.3d 1171 (Utah 2004) the Utah Supreme Court reviewed the district court's interpretation and application of former Sections 10-9-1001 and 10-9-1002 of the Utah Code. Section 10-9-1001, the appeals section, provided the procedure for parties seeking to challenge municipal land use decisions and required them to exhaust administrative remedies. In contrast, Section 10-9-1002, the enforcement section, authorized parties to initiate actions to enforce municipal land use ordinances without reference to any exhaustion requirement. After reading and analyzing the provisions in conjunction one with another, "attempting to give effect to and harmonize their collective provisions" the court reached the following conclusion:

> Consistent with these principles, the Enforcement section is available to parties seeking redress from an alleged ordinance violation in circumstances where the alleged violation is not authorized by or embodied in a municipal land use decision. When the alleged violation arises directly from a municipal land use decision, the parties must comply with the requirements of the statutory provision that specifically addresses appeals from land use decisions, section 10-9-1001. The court reviewing the appeal may then determine whether the land use decision was "arbitrary, capricious," or, as in the case of violated ordinances, "illegal."

Foutz v. City of South Jordan, 100 P.3d at 1175.

Currently, the "appeals section" is found at U.C.A. §10-9a-801, and the "enforcement section" is at U.C.A. §10-9a-802. Section 10-9a-801(1) directs a person to exhaust his administrative remedies with the "appeal authority" (the board of adjustment) when challenging a municipality's "land use decision." On the other hand, Section 10-9a-802 lists the types of remedies available where someone is alleging an ordinance violation in circumstances where the alleged violation is not authorized by or embodied in a municipal land use decision. Under these

circumstances, as stated in 10-9a-802, the appropriate remedy would be injunction, mandamus, abatement, or other appropriate remedies. The board of adjustment, however, is not the appropriate venue to address these issues, and it has no authority to provide these types of remedies.

Because the Board only has jurisdiction to hear appeals from affirmative land use decisions (such as those made in response to specific applications for zoning changes, conditional use permits, building permits, certificates of occupancy and so forth) the district court correctly concluded that Poll's allegations of ordinance violations or failures to act are not issues which the Board has authority to resolve. Rather, the court pointed out, Poll's recourse, if any, would most likely be to pursue a writ of mandamus or the political process. (Record at 428, transcript of oral argument pp. 33-34) This conclusion is consistent with the Utah Supreme Court's analysis in Foutz v. City of South Jordan.

III. THE BOARD OF ADJUSTMENT DOES NOT HAVE AUTHORITY TO PROVIDE MANDAMUS-TYPE RELIEF BY COMPELLING THE CITY TO ENFORCE ITS ORDINANCES

In his brief, Mr. Poll spends considerable effort alleging that the mayor and other city officials and agencies have failed to comply with or enforce city ordinances (Brief of Appellant at 10-12). Likewise, in his letter to the Board 24 Feb 2005, where he characterizes his action before the Board as "an appeal of failures to enforce several zoning provisions within our City ordinances," specifically alleging that these failures were on the part of "commissioners," "council members," and "the mayor" (Record at 168). As the district court explained, the remedy for these types of complaints, if any, would most likely be mandamus or the political

process (Record at 428, transcript of oral argument pp. 33-34). These are remedies the Board has no authority to provide.

Mr. Poll relies primarily on South Weber City Ordinance 10-4-4(A) as the authority for his position that the Board has the power to compel the mayor and other city officials to comply with or enforce city ordinances. That section reads as follows:

> The Board of Adjustments shall have the following powers:
>
> A. **Appeals:** To hear and decide appeals where it is alleged that there is error in any order, requirement, decision or determination made by the administrative official and [sic] the enforcement of any of the planning or zoning provisions of the City ordinances. (Emphasis added)

Although not entirely clear from Mr. Poll's various arguments, it appears that his position is that this section essentially grants the Board two very distinct types of powers: (1) the power to "hear and decide appeals where it is alleged that there is error in any order, requirement, decision or determination made by the administrative official" and (2) "the enforcement of any of the planning or zoning provisions of the City ordinances." However, this interpretation is inconsistent with both the intent of the ordinance and the authority of board's of adjustment generally. Consistent with the statutory authority granted board's of adjustment, or "appeal authorities," this section is only intended to provide authority for the Board to hear and decide a narrow class of appeals: those where an error is alleged to have been made in the enforcement of planning or zoning provisions of the city ordinances.

The way Mr. Poll reads it, the Board would be vested with broad authority under the first part to hear and decide appeals from <u>any</u> decisions made by an administrative official regardless

of whether the decision had anything to do with planning or zoning. Under the second part, as Poll sees it, the Board would be provided broad authority to "enforce" planning and zoning provisions. Based on his interpretation that this second part of the section provides authority for the Board to enforce planning and zoning provisions, Poll makes an unprecedented leap to the conclusion that the Board has authority to compel the city to enforce ordinances which he subjectively feels are going unenforced. In other words, Poll is arguing that a non law-trained board of adjustment has authority to issue mandamus-type remedies.

As pointed out in Black's Law Dictionary, even for a formal court of law "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Black's Law Dictionary, 495 (5th ed. 1983). Further, the process to pursue mandamus, or "extraordinary relief," is governed under Rule 65B of the Utah Rules of Civil Procedure. This section sets forth the grounds on which extraordinary relief is available, it provides standards of review, and it requires compliance with all relevant Utah Rules of Civil Procedure. If the legislative body of the city truly intended to provide mandamus-type oversight to the Board, it would not make sense for them to simply allude to this extraordinary power in one vague line buried under the "appeals" section. Nor would it make sense to impute this intent to the city council when (1) a procedure to pursue the remedy is already available under Rule 65B and (2) there is no statutory authority for the city to provide this type of power to a board of adjustment.

One of the problems with interpreting 10-4-4(A) is that there appears to be a typographical or clerical error. Out of context, it would make a certain amount of sense to read 10-4-4(A) as setting out two separate and distinct powers because the two parts are connected by the word "and" instead of "in." When the word "in" is used in place of "and", 10-4-4(A) makes

sense and is entirely consistent with statutory authority granted board's of adjustment. Read this way, this section, specifically captioned "Appeals," establishes the proper authority, consistent with U.C.A. §10-9a-701 et seq., for the Board to hear and decide appeals where an error is alleged to have been made "in" the enforcement of planning or zoning provisions of the city ordinances.

Finally, the district court correctly argued that even if the city council had unequivocally drafted an ordinance purporting to give that power to the Board, such an ordinance would be invalid because the city would not have had the authority to empower the Board beyond those powers specifically enumerated for boards of adjustment in state statute (Record at 428, transcript of oral argument pp. 37-41).

In short, if Poll has grounds to pursue a mandamus action as he appears to be claiming, then he should be required to pursue that extraordinary remedy properly in the district court. The argument that the Board has no jurisdiction to resolve Poll's issues is not an attempt to deprive him of any lawful remedy he might have. But the Board is simply not the proper venue to address the issues he has raised.

IV. NONE OF THE INDIVIDUAL ISSUES RAISED BY MR. POLL ARE APPEALS EMANATING FROM AN AFFIRMATIVE ORDER, REQUIREMENT, DECISION OR DETERMINATION IN WHICH A LAND USE AUTHORITY HAS APPLIED A LAND USE ORDINANCE TO A PARTICULAR APPLICATION, PERSON, OR PARCEL

A. Discussion of individual issues appealed to the district court under original case number 050700359. This brief will first address the issues raised in Poll's petition for review originally filed under case number 050700359.

1. Sewer placement trespass issue. Mr. Poll's appeal to the Board was stated as follows: "Failure to apply/enforce 10-3-2 in basic trespass issue relating to recent sewer placement onto Lester from the Byram Subdivision. Described in greater detail in 2 Apr 2005 letter to the Board." The only action required under South Weber Code §10-3-2 is that certain matters be submitted to the planning commission "for consideration and recommendation before action is taken thereon by the City Council or other City official." Again, however, alleged failures to comply with procedural requirements or violations of ordinances are not properly considered affirmative "decisions" from which an appeal to the Board may be taken, nor does the Board have authority to compel the city to enforce its ordinances.

Utah Code Ann. §10-9a-701(2) also requires an adversely affected person to timely and "specifically" challenge a land use authority's decision. One of the chief problems in responding to Mr. Poll's appeals is lack of specificity. For instance, on this issue Mr. Poll's appeal does not specify who failed to "apply/enforce 10-3-2, " or in what way there was a failure in application or enforcement. At any rate, it appears that Poll is complaining primarily about an alleged trespass that has taken place in connection with the placement of the sewer. Whether Mr. Poll has a cause of action based on the placement of the sewer is not an issue for the Board to determine. This type of claim should be subject to formal rules of procedure, evidence, and discovery. The Board simply is not the correct forum to resolve these types of issues, and Poll should not be permitted to use the Board as a means to circumvent the formal requirements associated with bringing appropriate causes of action if he has grounds.

The district court noted that Poll was essentially asking the Board to determine whether a trespass had occurred, and correctly concluded that "the Board had no authority or duty to resolve

this issue because it involves an alleged failure to apply or enforce a city ordinance rather than an appeal from an affirmative decision applying a land use ordinance." (Record at 409).

2. Fire hydrant issue. Poll alleges that there was "failure to apply/enforce ordinance 10-3-2, 10-3-9, and 10-14-10 described in greater detail in 31 Mar 2005 letter to the Board. Matter involves placement of a fire hydrant at the end of 1375 East without the requisite support facilities." (In ¶ 4 on page 6 of Poll's Petition he indicates that §10-3-9 was not referenced in his appeal to the Board, and that it is not at issue here.) These allegations involve alleged failures to comply with procedural requirements or violations of ordinances. Because this is not a situation involving a specific decision in which a land use authority has applied a land use ordinance, there is nothing ripe for an appeal to the Board. As with the previous issue, the district court correctly concluded that "[t]he fire hydrant issue is likewise beyond the Board's authority to resolve because it involves an alleged failure to apply or enforce a city ordinance rather than an appeal from an affirmative decision applying a land use ordinance." (Record at 410).

3. Interpretation and application of the city's sensitive land ordinance. As previously argued in this brief, U.C.A. §10-9a-701(2) requires an adversely affected person to "specifically" challenge a land use authority's "decision." Section 10-9a-703 elaborates on the process, stating that a "person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may . . . appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance." In Mr. Poll's appeal to the Board, he requested:

> Interpretation of Sensitive Land Ordinance (Title 10, Chapter 14), violation of it by the developer of the Highland Estates Subdivision (slope destruction), and the unresolved dispute concerning it between the City and the Davis and Weber Counties Canal Company. Particular emphasis on the Company's insistence that destruction has occurred and that an independent third-party-expert opinion is still required to address this violation. This is cited in limited form in the 31 Mar 05 letter to the Board (item 1 B).

(Record at 28-29 and 407).

Initially this broad request lacks sufficient specificity and clarity for the Board to know exactly what is expected by way of a response. Further, a general request to the Board to provide an "interpretation of the Sensitive Land Ordinance" is, by itself, meaningless. The code permits an appeal to the Board when a person has been adversely affected by a land use authority's decision "administering or interpreting" a land use ordinance. Poll fails to identify specifically what interpretation error was made and by whom. Therefore, the Board could not have provided any meaningful "interpretation." Poll's appeal further suggests that there is some violation by the developer and a related but unresolved dispute among a number of parties. While these questions might properly be explored with the city council or other city officials, the developer's alleged failure to comply with the ordinance simply would not amount to an affirmative "decision" by the City from which to appeal.

The issues raised in this section are essentially requests for advisory opinions. Concerning advisory opinions, the Utah Supreme Court stated, "[t]he appellate court will not issue advisory opinions or examine a controversy that has not yet sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation

to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication." Houghton v. Dep't of Health, 125 P.3d 860, 868 (Utah 2005) (quoting State v. Ortiz, 987 P.2d 39 (Utah 1999)). *See also* Summit Water Distrib. Co. v. Summit County, 123 P.3d 437, 452 (Utah 2005) ("Our settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us"). While the Board is not a court of law, it is nevertheless a quasi-judicial body, and the same rationale for avoiding advisory opinions should apply.

Finally, it appears under this section that Poll is alleging that the Sensitive Land Ordinance requires that the city hire an independent consultant and that the city erroneously failed to do so. However, while the ordinance permits the hiring of an independent consultant, it does not require it, and as argued throughout this memorandum, only affirmative decisions, not alleged failures to act, may be appealed to the Board.

The district court correctly concluded that "there is nothing in the Act or city ordinances that requires or permits the Board to provide advisory opinions." (Record at 410).

B. Discussion of individual issues appealed to this court under original case number 050700250. Although a number of amendments were made to the Municipal Land Use, Development, and Management Act in 2005, those amendments did not become effective until May 2, 2005. Former U.C.A. §10-9-704 therefore applies to this petition for review because the appeal was heard on March 29, 2005. Utah Code Ann. §10-9-704, limits appeals to the board of adjustment to persons adversely affected by a decision administering or interpreting a zoning

ordinance,[3] and the elements of a proper appeal to the Board under this Section are: "(1) a person adversely affected, (2) a decision administering or interpreting a zoning ordinance, (3) a decision applying the zoning ordinance, and (4) an error in the decision administering or interpreting the zoning ordinance." Busche v. Salt Lake County, 26 P.3d at 867 .

1. Subdivision plat issues. In his petition, Poll argues that the Board's decision was not responsive to the issue he raised. In his petition, Poll specifically states that he "challenged the Mayor's failure to require the subdivider to either stay within the drawn-to-scale boundaries of the approved plat . . . or to require the subdivider to vacate the approved plat and create a new one. . ." While the Board determined that Poll was not an "aggrieved" or "adversely affected party," there are several additional reasons why this issue is not within the scope of the Board's authority. First, there is no "decision" appealed from. Poll is complaining about alleged violations of ordinances and/or failures to act rather than responding to an affirmative order, requirement, decision or determination. Because there is no decision, there is no accompanying administration, interpretation, and application of a zoning ordinance from which to appeal. Second, U.C.A. §10-9-704 permits appeals from decisions administering or interpreting a "zoning ordinance." The issues raised involve the subdivision ordinance, not the zoning ordinance. Third, the Board has no authority to compel the mayor to take action against a developer.

The district court correctly concluded that "the Board did not have authority to resolve this issue because it does not involve a decision administering or interpreting a zoning ordinance

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[3] See U.C.A. §10-9-704, footnote 2, supra.

as required under former Section 10-9-704 of the Utah Code." (Record at 409).

2. Vinyl Fence. **This issue has become moot.** Mr. Poll and the City have apparently reached an agreement concerning the fence at issue.

This issue would not fall within the jurisdiction of the Board anyway "because it does not involve a decision administering or interpreting a zoning ordinance as required under former Section 10-9-704 of the Utah Code. Rather, it involves an alleged failure to enforce the subdivision ordinance." (Record at 409). Therefore, the district court correctly concluded that the Board has no authority to resolve this issue. (Id.)

3. Construction of the road. **This issue is moot.** This appears to be an allegation by Poll that an unapproved road was constructed by the developer in connection with a subdivision. Neither the city nor the developer claims that the area in question was anything more than a construction access; nobody intended for it to be a road, and in fact there is no road. The district court correctly determined that this issue "has been rendered moot at this point because no such road has been constructed." (Record at 409). Further, in this instance, as with others, there was no order, requirement, decision or determination made by an administrative official, nor was there a decision administering or interpreting a zoning ordinance.

4. Easements on 1375 East. **This issue is moot.** Like the previous two issues, this issue is also now moot. In fact, Judge Memmott is the judge who has already decided this issue in a separate law suit brought by Mr. Poll in the district court (Record at 29, 49-50).

In this case it appears that Mr. Poll is alleging that the mayor, city manager, and city attorney improperly offered opinions concerning the necessity of obtaining easements on 1375

East, and in fact Poll accuses the mayor and city manager of outright criminal conduct. It also appears that he is alleging that the decision of the planning commission and/or city council to approve the Byram Subdivision was somehow improper because it was influenced by those opinions (Record at 11-15). Frankly, the appeal amounts to a convoluted medley of grievances, accusations, and subjective legal assumptions. Vagueness and lack of specificity alone should be sufficient grounds to deny further review of this item. Moreover, the only decision that was made was the decision to approve the subdivision in accordance with the subdivision ordinance. There was no requirement, decision, or determination made by an administrative official, nor was there a decision administering or interpreting a zoning ordinance. Essentially, Poll is asking the Board to resolve a dispute concerning ownership or right of use of 1375 East. This would be well beyond the jurisdiction of the Board.

CONCLUSION

Based on the foregoing, the appellee asks this Court to affirm the district court's order dismissing Brent Poll's Petitions for Review for lack of jurisdiction.

DATED this 31st day of May, 2007.

CHRISTOPHER F. ALLRED
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that on the 31st day of May, 2007, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Brent Poll, 7605 South 1376 East, South Weber, Utah 84405.

Addendum

Utah Code Ann. §10-9a-103
As used in this chapter:
(2) "Appeal authority" means the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.
(13) "Land use application" means an application required by a municipality's land use ordinance.
(14) "Land use authority" means a person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application.

Utah Code Ann. §10-9a-701
(1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:
(a) requests for variances from the terms of the land use ordinances; and
(b) appeals from decisions applying the land use ordinances.
(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

Utah Code Ann. §10-9a-703
The applicant, a board or officer of the municipality, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

Utah Code Ann. §10-9a-707
(4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

South Weber City Ordinance 10-4-4
POWERS OF THE BOARD: The Board of Adjustment shall have the following powers:
A. Appeals: To hear and decide appeals where it is alleged that there is error in any order, requirement, decision or determination made by the administrative official and the enforcement of any of the planning or zoning provisions of the ordinances of the City.